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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/698,595	10/27/2000	Duane Girard Uitenbroek	KCC-15,219	8268

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EXAMINER

PIZIALI, ANDREW T

ART UNIT PAPER NUMBER

1771

DATE MAILED: 10/19/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/698,595	<b>Applicant(s)</b> UITENBROEK ET AL.	
	<b>Examiner</b> Andrew T Piziali	<b>Art Unit</b> 1771	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 24 September 2004.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-44 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-44 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 8/30/2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                                   | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. _____  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>9/24/2004</u> .   | 6) <input type="checkbox"/> Other: _____                                    |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over by USPN 5,036,551 to Dailey et al. (hereinafter referred to as Dailey) in view of US Statutory Invention Registration H1750 to Dobrin in view of USPN 4,829,096 to Kitamura et al. (hereinafter referred to as Kitamura).

Regarding claims 1-44, Dailey discloses a breathable laminate fabric that finds utility in articles of wearing apparel, comprising a breathable, microporous, elastic film, and a nonwoven facing material bonded to the film (see entire document including column 1, lines 5-10, column 4, lines 10-28 and column 9, lines 5-15). Dailey does not specifically mention selectively stretching the laminate in one or more regions to form zones of differential breathability, but Dobrin discloses that it is known in the art of clothing manufacture, specifically diapers, to form zones of differential breathability to reduce heat and/or vapor build up in zones of the clothing (see entire document including column 8, lines 54-64). It would have been obvious to one having ordinary skill in the art at the time the invention was made to use the fabric of Dailey to make a diaper with zones of differential breathability, as taught by Dobrin, because zones of differential breathability help reduce heat and/or vapor build up in specific areas of clothing such as diapers.

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Dobrin does not specifically mention forming the zones of differential breathability by stretching the laminate, but Kitamura discloses that it is known in the art to stretch a film to impart breathability thereto (see entire document including column 3, line 63 through column 4, line 30 and column 5, lines 52-59). It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the zones of differential breathability from any suitable method, such as by selectively stretching, as taught by Kitamura, because stretching is capable of forming the differential zones of breathability.

Regarding claims 2-4 and 20-21, Dobrin discloses that if the clothing is a diaper the zones of differential breathability may comprise at least one zone of higher breathability and at least one zone of moderate breathability, and the at least one zone of higher breathability may have a water vapor transmission rate at least 50% higher than a water vapor transmission rate of the at least one zone of moderate breathability (column 8, line 54 through column 9, line 28). In addition, it would have been obvious to one having ordinary skill in the art at the time the invention was made to vary the water vapor transmission rates of the differential zones because it is understood by one of ordinary skill in the art that the water vapor transmission rates determine the breathability of the zones and different clothing articles require different zones and different breathability within those zones. It has been held that discovering an optimum value of a result effective variable involves only routine skill in the art.

Regarding claims 5-7, 22-24 and 35-37, Dailey discloses that the water vapor transmission rate of the laminate, before any stretching, may be about 5000 grams/m<sup>2</sup> - 24 hours (column 7, lines 21-26).

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Regarding claims 8 and 25, Dailey discloses that the laminate may be elastomeric (see title).

Regarding claims 9, 26 and 38, Kitamura discloses that the stretching can be done uniaxially or biaxially to impart the desired breathability thereto (paragraph bridging columns 3 and 4).

Regarding claims 10, 27 and 39, Dailey discloses that the facing material may be elastomeric (column 4, lines 10-28).

Regarding claims 11 and 40, Kitamura discloses that the selectively stretched regions may be stretched at least twice (column 3, line 63 through column 5, line 12).

Regarding claims 12-17, Dailey does not specifically mention how much the laminate can be stretched, but considering the substantially identical article and method of manufacturing of the laminate taught by the prior art, compared to the currently claimed laminate, it appears that the laminate taught by the prior art may be stretched by about 100% to about 150% in either the machine direction or the cross direction.

The Patent and Trademark Office can require applicants to prove that prior art products do not necessarily or inherently possess characteristics of claimed products where claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes; burden of proof is on applicants where rejection based on inherency under 35 U.S.C. § 102 or on prima facie obviousness under 35 U.S.C. § 103, jointly or alternatively, and Patent and Trademark Office's inability to manufacture products or to obtain and compare prior art products evidences fairness of this rejection, *In re Best, Bolton, and Shaw*, 195 USPQ 431 (CCPA 1977).

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Regarding claims 18 and 29-44, Dobrin discloses that the laminate may comprise the outer cover of an absorbent article such as a diaper (see entire document including column 1, lines 5-8).

Regarding claims 19-28, Dailey discloses a wide variety of materials that may be used for the breathable, microporous, elastic film (see entire document), but Dailey does not specifically mention the water vapor transmission rate of the microporous film. Considering the substantially identical article and method of manufacturing of the laminate taught by the prior art, compared to the currently claimed laminate, and considering that it would have been obvious to one having ordinary skill in the art at the time the invention was made to vary the water vapor transmission rates of the differential zones (as taught above), it would have been obvious to one having ordinary skill in the art at the time the invention was made to make the laminate with any desired water vapor transmission rate zones, such as claimed by the current applicant, because it is within the general skill of a worker in the art to select a known water vapor transmission rate based on the intended application.

Regarding claim 28, Dailey discloses that the facing material may be adhesively bonded to the film (column 11, lines 39-51).

Regarding claims 31-33 and 42-44, the prior art does not specifically mention when the stretching is to occur, but absent a showing of unexpected results, it would have been obvious to one having ordinary skill in the art at the time the invention was made to stretch the laminate prior to incorporation into the article, subsequent to incorporation into the article, or while applied to a wearer, because it is within the skill of one in the art to determine when to stretch the article based on the desired manufacturing method.

Regarding claims 31-33, the prior art does not specifically mention when the stretching is to occur, but it is the examiner's position that the article of the applied prior art is identical to or only slightly different than the claimed article. Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985). The burden has been shifted to the applicant to show obvious difference between the claimed product and the prior art product. *In re Marosi*, 218 USPQ 289 (Fed. Cir. 1983). The applied prior art either anticipated or strongly suggested the claimed subject matter. It is noted that if the applicant intends to rely on Examples in the specification or in a submitted declaration to show non-obviousness, the applicant should clearly state how the Examples of the present invention are commensurate in scope with the claims and how the Comparative Examples are commensurate in scope with the applied prior art.

### ***Response to Arguments***

3. Applicant's arguments filed 9/24/2004 have been fully considered but they are not persuasive.

The applicant asserts that Dailey, Dobrin, and Kitamura each fail to teach or suggest that each of the zones of differential breathability includes a portion of the film and a portion of the nonwoven facing material. The examiner contends that Dailey in view of Dobrin in view of Kitamura discloses the claimed laminate.

Dailey discloses a breathable laminate fabric that finds utility in articles of wearing apparel, comprising a breathable, microporous, elastic film, and a nonwoven facing material bonded to the film (see entire document including column 1, lines 5-10, column 4, lines 10-28 and column 9, lines 5-15). Dailey does not mention zones of differential breathability, but Dobrin discloses that it is desired in the art of clothing manufacture, specifically diapers, to form zones of differential breathability to reduce heat and/or vapor build up in zones of the clothing (see entire document including column 8, lines 54-64).

Dobrin creates the zones of differential breathability by eliminating an inner layer of fabric in the zones desired to have a higher breathability (column 9, lines 17-21), but Dailey does not teach or suggest that one of the layers of fabric of the disclosed laminate may be removed if desired. Therefore, it would not have been obvious to one having ordinary skill in the art at the time the invention was made to eliminate one of the layers of fabric from select zones of the laminate of Dobrin, because such a modification would have destroyed the invention of Dobrin.

Since Dobrin is silent with regard to a feasible method of forming zones of differential breathability in the laminate of Dailey, it would have been obvious to look to the prior art for a feasible method. Kitamura provides this conventional teaching showing that it is known in the art to stretch a film to impart breathability thereto (see entire document including column 3, line 63 through column 4, line 30 and column 5, lines 52-59). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to selectively stretch the laminate of Dailey motivated by the expectation of successfully creating zones of differential breathability.



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The applicant admits that Kitamura teaches uniaxially or biaxially stretching a fabric, but asserts that the prior art does not teach or suggest stretching just a portion of a fabric (selectively stretching). The examiner respectfully disagrees. In view of the teachings of Dobrin, the fabric of Dailey desirably possesses select zones of higher and lower breathability. Considering that Kitamura discloses that it is known in the art to stretch a fabric to increase breathability, it would have been obvious to make the zones of differential breathability in the laminate of Dailey by selectively stretching the laminate motivated by the expectation of successfully creating zones of differential breathability.

#### *Conclusion*

4. All claims are drawn to the same invention claimed prior to filing the Request for Consideration (RCE). Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the RCE. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).
5. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrew T Piziali whose telephone number is (571) 272-1541. The examiner can normally be reached on Monday-Friday (8:00-4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

atp

 10/14/04  
**ANDREW T. PIZIALI**  
**PATENT EXAMINER**

  
**Ms. Arti R. Singh**  
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**Tech Center 1700**